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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 15 2010

SRC 07 800 18421

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral research associate at Duke University, Durham, North Carolina. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and various exhibits, most of which duplicate materials already in the record.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on June 29, 2007. In a statement accompanying the initial filing, counsel stated that the petitioner "has extensive research experience in the nationally crucial field of medical engineering, particularly focusing on cancer research." Counsel asserted: "As evidence of the recognition [the petitioner's] work has received from the research community, leading researchers in his field and scientists at research universities throughout the United States have submitted letters of

support." Of the six letters submitted with the petition, five are from current or former faculty members at Duke or the University of Utah (where the petitioner earned his doctorate).

[redacted] the petitioner's supervisor since 2005, stated:

> Ever since [the petitioner] joined our institute, we have been collaborating on a research project for the development of novel real-time MRI [magnetic resonance imaging]-based feedback controllers to further study the combined bio-effects of hyperthermia with radiation and chemotherapy. This research will substantially benefit cancer patients everywhere in the United States.
>
> . . . Hyperthermia is a cancer treatment method that . . . relies on focusing power into the cancerous region to raise and sustain the tumor temperature at a therapeutic level, (43°C), so as to deliver a lethal thermal dose. At the same time, surrounding normal tissues' temperatures are required to be maintained at safe lower levels, e.g., 38-41° C, to prevent damage. Delivering such focused power . . . is a challenging task. . . . Moreover, to gauge the effectiveness of a hyperthermia treatment, temperature measurements are necessary. However, the traditional thermocouple temperature measurement technique is invasive. . . . [The] nonlinear temperature behavior in humans makes real-time temperature prediction challenging and the numerical simulations of bio-heat transfer equation difficult and time-consuming. Recognizing these challenges, our research group at Duke University proposed a way to re-formulate the problem that enables us to . . . use real-time magnetic resonance images as a feedback for a controller (to be developed) to directly adjust the amplitudes and phases of antennas. A model reduction method was also developed according to this formula, which serves as a foundation to develop a real-time feedback control algorithm that automatically steers and focuses microwave power to tumor. . . .
>
> After [the petitioner] joined my research project, he developed a least-squares error based feedback focusing algorithm that gives the best approximated driving vector to drive our microwave antenna array to steer and focus at tumor. . . . [B]ased on [the petitioner's] solid understanding in applied mathematics, we saved significant time and effort. Regarding another important part of my research project: using model reduction methods to enable real-time feedback control . . . we successfully extended our original model reduction . . . to handle practical situations for which blood perfusion depends on nonlinearly on temperature variations. The success of this model reduction method allows us to build a "virtual antenna phased array." . . . Thus, significant time and effort are saved on antenna array calibrations, since we do not need to build many different antenna arrays.

[redacted], the petitioner's "academic supervisor at the University of Utah" (UU), stated that the petitioner "has already demonstrated his ability to make important contributions in this

area of research. . . . [I]t would be realistic to anticipate more significant contributions from his continued participation in these research efforts."

[redacted], an adjunct research assistant professor at UU and a member of the petitioner's thesis defense committee, stated: "The most significant finding in [the petitioner's] two years [of] postgraduate research was revelation of the possibility of focusing power at tumor deeply seated in human brain without craniotomy." [redacted] also stated: "we worked together on combining a model reduction method for ultrasonic propagation in human heterogeneous tissues to the bio-heat transfer equations. This is expected to produce significant impact on ultrasonic hyperthermia . . . [by reducing] computational times to simulate for one set of ultrasound transducer settings." [redacted] noted that, in his postdoctoral work, the petitioner studied microwaves rather than ultrasound, but stated: "with his solid backgrounds in engineering and applied mathematics, I expect him to succeed in that area."

[redacted] of Seattle Pacific University stated:

> I was a faculty member in the Department of Mechanical Engineering at University of Utah, while [the petitioner] pursued his doctoral degree, and served on his graduate advisory committee. During that time, I became well acquainted with him. . . . The results which [the petitioner] obtained have great importance in developing non-invasive methodologies for cancer treatment.

[redacted]r stated that the petitioner's "Ph.D. efforts have received international recognition," and that the petitioner's "novel real-time MRI based feedback focusing algorithm overcomes the measurement noise which previously plagued our MRI temperature images, and he has made major forward progress handling the uncertainties in human dielectric and thermal diffusion properties." [redacted] deemed the petitioner "virtually indispensable to the success of our ongoing research."

The only initial witness without a Duke or UU connection is [redacted] reader in Therapeutic Ultrasound at the Institute of Cancer Research, Sutton, United Kingdom, who stated: "I have personally never worked with [the petitioner], but I knew him through a short phone interview when he applied for a postdoctoral fellow position within my research group." [redacted] did not indicate whether or not the interview resulted in a job offer. Describing the petitioner's work, [redacted] stated:

> An important finding made by [the petitioner] in Taiwan was the demonstration in 1997, using his numerical simulations . . .[of] the possibility of using a sharply focused ultrasonic beam . . . to destroy deep-seated brain tumours in patients while sparing surrounding normal brain tissue and the skull. . . . An important output of his studies [at UU] is information about the spatial distribution of thermal effects from a single Gaussian shaped focal zone pulse that results in the maximum allowable temperature at the centre point of the focal zone.

> . . . His work to date has already shown the promise of new ways of simplifying the time intensive pre-treatment optimization and real-time control of hyperthermia for cancer treatment. His achievements are truly significant and have had an important impact on this branch of cancer research.

The petitioner submitted copies of his published articles and conference presentation abstracts, but no direct evidence of how the scientific community received these works. The petitioner also submitted evidence of his participation in peer review of manuscripts, but nothing to show that such peer review is regarded as a privilege rather than a widely shared duty.

On October 8, 2008, the director instructed the petitioner to submit further evidence to establish eligibility under *Matter of New York State Dept. of Transportation.* The director stated that the petitioner's initial evidence does not sufficiently distinguish him from others in the field.

In response, the petitioner submitted copies of additional articles, abstracts, and peer review documentation. The director had not indicated that submission of more such materials would establish eligibility. These materials establish only that the petitioner has been productive in his field; they do not establish the impact of the petitioner's work. Furthermore, many of these materials (as well as information regarding the petitioner's receipt of a $250 prize from Duke) appeared well after the petition's filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, a previously ineligible alien cannot become eligible as a result of events that occurred after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

The petitioner submitted copies of three "[s]elected paper[s] citing [his] work," and database printouts identifying a total of eight citing articles. Four of these citations are self-citations by the petitioner or his collaborators, or citations by others who have worked closely with the petitioner. One of the three submitted articles contains such a self-citation; [redacted] co-wrote the article, citing his own earlier work with the petitioner. Only one of the independent citations was published before the petition's June 2007 filing date. As noted in the preceding paragraph, subsequent developments do not show that the petitioner was already eligible on the filing date, before those developments took place.

Eight further letters accompanied the petitioner's response to the director's notice. [redacted] stated that the petitioner "is the only one who has succeeded in developing a novel method of dynamical MR-based feedback control of antenna patterns for hyperthermia treatment." [redacted] described the petitioner's proposal of a "virtual antenna phased array" as "[a]nother breakthrough method."

[redacted] one of the petitioner's former instructors, stated that the petitioner's "work was much better than others' work" in terms of "developing algorithms to better destroy cancerous tissues using externally applied and focused energy sources." [redacted] stated that the petitioner's method used fewer antennas "and also addressed issues of overcoming the heat dissipation issue . . . and the antenna excitation uncertainty."

[redacted] stated that the petitioner ranks "among the top 1% in ability among the graduate students that I have met," but did not discuss specifics of the petitioner's work. [redacted] stated that the petitioner "has already done exceptional work in the area of hyperthermia" and "has had considerable success in applying" "novel mathematical methods to solve engineering problems."

[redacted] credited the petitioner with "significant achievements in the treatment optimization and control of power delivery of hyperthermia." [redacted] devoted much of his letter to the petitioner's "develop[ment of] a real-time virtual source feedback controller." The earlier letter from [redacted] indicated that, at the time of filing, such a controller was still "to be developed," and the petitioner was, at the time, studying feedback mechanisms to be applied in the future development of the controller.

[redacted] of Charité Medical School in Berlin, Germany, stated that the petitioner "developed a new technical method to optimize hyperthermia treatment of patients with cancer in the extremities . . . [using] mini-annular phased array applicators under Magnetic Resonance (MR) guidance. This is a significant contribution to the field of hyperthermia."

[redacted] of the University of California, San Francisco, stated:

> [The petitioner] devised a rather novel modeling approach to study the impact on tissue properties and the optimal methods to produce hyperthermia treatments using focused ultrasound devices. . . . [A]t Duke University, . . . he has developed and implemented very accurate and powerful algorithms for computer modeling the electromagnetic fields and heating patterns for the deep heating applicators. . . . [The petitioner] has devised an inverse planning approach to better control and deliver optimized heating power to lead to better and safer patient treatment. . . .
>
> In summary, [the petitioner] is an excellent and recognized researcher in both the field of hyperthermia cancer therapy and biomedical modeling.

[redacted] of the University of Arkansas for Medical Sciences credited the petitioner with "substantial contributions to the field of local-regional hyperthermia using externally applied energy sources like ultrasonic (US) and electromagnetic (EM) waves." [redacted] praised the petitioner's published work, but the only paper that he discussed in detail was a 2008 paper that had not yet been published at the time of filing.

The shortest letter is from [redacted] of the University Medical Center, Utrecht, the Netherlands. [redacted] stated: "I . . . know the groups of [redacted] [and] [redacted] very well. [The petitioner] did very good scientific work in these groups, he contributes with outstanding papers in the field of oncology."

The director denied the petition on December 9, 2008. The director acknowledged the intrinsic merit and national scope of the petitioner's occupation, but found that the petitioner had not established the "unique significance" of his work. On appeal, counsel states that the petitioner's "record of prior achievement in medical engineering" is "quite apparent" from the record, and that the petitioner "has played a leading role and served in an important capacity at many research and academic institutions." The petitioner's current work in radiation oncology, which is the cornerstone of his waiver claim, has taken place at only two institutions, while the petitioner was a student at UU and a postdoctoral researcher at Duke. Counsel's reference to "many . . . institutions" includes prior short-term teaching positions in Taiwan, regarding subjects such as "Construction Management" and "Soil Mechanics" with no demonstrated relevance to the waiver claim.

Regarding the petitioner's participation in peer review of journal manuscripts, counsel states:

> This is particularly impressive because Ph.D. students and Post Doctoral Fellows are normally only invited to serve as reviewers of manuscripts submitted by their peers or other scientists with vastly more experience under supervision. Inviting an individual who is still a Ph.D. student to act as a peer reviewer and associate editor is explicit recognition that Appellant is considered outstanding in comparison not only to his peers but also to individuals with vastly more experience than him.

The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has submitted evidence of his work as a peer reviewer, and on appeal he submits a copy of the "Guidelines for Referees of Articles for *Medical Physics*," but these materials do not support counsel's claims. The "Guidelines" state: "In serving as a reviewer, it is permissible to ask a student or fellow to review an article as a learning experience." This passage permits a reviewer to delegate responsibility to a subordinate, but it does not show that students and fellows rarely receive review requests in their own right.

Counsel states that the petitioner "received a top prize" at a 1997 conference for "a very significant finding in developing treatment for patients with brain tumors using safer, non-invasive techniques." The record contains no objective, documentary evidence to show the extent, if any, to which the petitioner's finding has been put to practical use in cancer treatment during the ten years between the 1997 conference and the 2007 filing of the petition.

Counsel states that the petitioner failed to give sufficient consideration to independent witness letters, and the petitioner submits a copy of a previous AAO decision in which the AAO approved a petition on the basis of strong witness letters in the absence of heavy citation of the alien's published work. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Also, we must consider each case on its individual merits. Where, as here, the value of the petitioner's work is said to lie in its usefulness in improving cancer therapy, it is not only reasonable but essential for us to note the

evidence, or lack thereof, regarding the actual use of the petitioner's methods in such therapy. The record contains little information on this point.

Also, while we have not disregarded the independent witness letters, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *See Matter of Caron International*, 19 I&N Dec. 791 (Commr. 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* at 795. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795.

In evaluating the reference letters, we note that letters containing mere assertions of industry interest and positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's *curriculum vitae* and work and provide an opinion based solely on this review.

Here, some letters place considerable emphasis on developments after the petition's filing date. Only one independent witness [redacted] specifically claimed to have been familiar with the petitioner's work prior to the filing of the petition. The letters show that the petitioner has located witnesses who are strongly impressed by his work, but they are not the definitive evidence of major influence that counsel claims. The petitioner's minimal citation record at the time of filing, along with other information in the record, indicates that while the petitioner's work may indeed hold promise for future cancer therapies, his demonstrated impact as of the filing date did not distinguish him from his peers. At best, the petitioner filed the petition prematurely.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.